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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 364

ALBERT SMITH,

Petitioner,

vs.

JOSEPH O'GRADY, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

PETITIONER'S BRIEF IN REPLY TO RESISTANCE TO APPLICATION FOR WRIT OF CERTIORARI

ALBERT SMITH,
Pro Se.

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PETITIONER'S BRIEF IN REPLY TO RESISTANCE TO APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

By authority of Rule 38, Paragraph 4 (a) of the Revised Rules of this Court effective February 27, 1939, your petitioner respectfully presents this REPLY BRIEF in response to the RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI filed herein, on the face of which it appears that:

1.

The respondent herein has made every effort possible to confuse and mislead this Court.

On page 2 of his brief the respondent stated that the "Petitioner is merely seeking another hearing in this court

which is obviously for the purpose of rehearing only." Petitioner wishes to respectfully point out to this Honorable Court that he has not yet had a first hearing, and that in the courts of the State of Nebraska he did not even have impartial consideration of his case.

Then, in Point F of his brief, on pages 14, 21, 26, and 27 therein, the respondent cited four contentions which he alleges were made by the petitioner, all of which were reconstructed in such a manner as to make it appear to this Court that your petitioner alleged the deprivation of rights provided only by the Constitution and Statutes of the State of Nebraska. An examination of the petitioner's original petition and supporting brief will disprove this effort of the respondent, because such an examination will disclose that only Federal questions of substance were raised by the petitioner in his petition for a writ of certiorari, and that each question is supported by either the Sixth or Fourteenth Amendments to the Constitution of the United States, or both.

2.

The respondent herein has totally failed to disprove a single one of the contentions made by the petitioner in his petition for a writ of certiorari.

On page 19 of his brief, the respondent stated that: "Respondent cannot resist the temptation to suggest that petitioner must do more than rely upon a 'causual' (casual) remark in an unrelated case if he hopes to prevail in his present contention", yet throughout his entire brief the respondent himself relies upon remarks that could be classified as casual, if his suggestion is to be accepted at face value. For example, in an effort to side step the true circumstances under which youf petitioner was practically forced to enter a plea of guilty, respondent quoted syllabi from opinions rendered by this Court and the Supreme

Court of Nebraska, neither of which will apply, by any stretch of the imagination, to the instant case. Starting on the bottom of page 16 of his brief, the respondent stated, in reference to the petitioner's plea of guilty, that:

> "Indeed, in the latter case, the Supreme Court of Nebraska has repeatedly held that:
>
> "'A person charged with crime may, by a judicial confession of guilt, waive all the rights secured to him by Section 11, Article I of the Constitution (of Nebraska).' McCarty *v.* Hopkins, 61 Neb. 550, 85 N. W. 540; Alexander *v.* O'Grady, 290 N. W. 718; Davis *v.* O'Grady, 291 N. W. 82.
>
> "With respect to the corresponding guarantees in the Sixth Amendment to the Federal Constitution, this court has expressed itself as follows:
>
> > "'A plea of guilty to an indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the natural effects of it are understood by the accused.' Patton *v.* U. S., 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253.
>
> "Counsel for respondent do not understand this court to have implied in the above language that an accused who receives a heavier sentence than he anticipated after a plea of guilt should thereafter be permitted to assert that he did not understand 'the natural effects' of his plea.
>
> "Petitioner does not and can not cite any decision either by this court or by the Supreme Court of Nebraska to the effect that the above quotations do not correctly state the law."

Your petitioner has no dispute with the above quotation taken from the opinion in the *Patton* case, *supra,* but your petitioner definitely does take issue with the balance of the quotation taken from the respondent's brief. The quo-

tation from the *Patton* opinion does state the law correctly, as far as it goes, but your petitioner wishes to point out that there are at least four separate and distinct reasons why it and the quotation from the *McCarty* case, *supra,* are wholly inapplicable to the instant case. First, it is a well known fact that a plea of guilt is not necessarily "a judicial confession of guilt", and even if it was, the quotation from the *McCarty* case seems to have overlooked those fundamental rights secured by the Sixth and Fourteenth Amendments to the Constitution of the United States—rights which cannot be waived and which are also included in Article I Section 11 of the Constitution of Nebraska. Second, as the respondent so aptly put it, he "must do more than rely upon a casual remark" if he hopes to prevail in his present objection. If the petitioner's citations be casual remarks, so, also, are those of the respondent. Third, the *Patton* case was a Federal case and the prosecution was made on an indictment rendered by a grand jury, not on the information of an unscrupulous county attorney, and because of this fact there was no reason why this Court should go to the trouble of showing just why a plea of guilty to an INDICTMENT is acceptable under the stated qualification. Fourth, the quotation as it appeared in the *Patton* opinion was originally used many years before by the Court of Appeals of New York in the case of *Cancemi* v. *People,* 18 N. Y. 136, and when the appropriate portion of the opinion therein is shown, it is easy to understand why the quotation from the *Patton* opinion will apply ONLY to cases wherein the prosecution is had upon an INDICTMENT returned by a grand jury, because the Court of Appeals of New York held that:

> "Criminal prosecutions involve public wrongs, a breach and violation of public rights and duties, which affect the whole community, considered as a community, in its social and aggregate capacity. The pen-

alties or punishment, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; FOR NO ONE HAS A RIGHT, BY HIS OWN VOLUNTARY ACT, TO SURRENDER HIS LIBERTY, OR PART WITH HIS LIFE. THE STATE—THE PUBLIC—HAVE AN INTEREST IN THE PRESERVATION OF THE LIBERTIES AND LIVES OF THE CITIZENS, AND WILL NOT ALLOW THEM TO BE TAKEN AWAY WITHOUT DUE PROCESS OF LAW, when forfeited, as they may be as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. These considerations make it apparent that the right of a defendant, in a criminal prosecution, to effect, by consent, the conduct of the case, should be made more limited than in civil actions. IT SHOULD NOT BE PERMITTED TO EXTEND SO FAR AS TO MAKE RADICAL CHANGES IN GREAT AND LEADING PROVISIONS, AS TO THE ORGANIZATION OF THE TRIBUNALS, OR THE MODE OF PROCEEDING PRESCRIBED BY THE CONSTITUTION AND LAWS. Effect may justly and safely be given to such consent in many particulars, and the law does, in respect to various matters, regard and act upon it as valid. Objections to juries may be waived. The court may be substituted for triers to dispose of challenges to juries. Secondary, in place of primary, evidence may be received. Admissions of fact are allowed; and, in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what, without it, would be erroneous. A PLEA OF GUILTY TO ANY INDICTMENT, WHATEVER MAY BE THE GRADE OF THE CRIME, WILL BE RECEIVED AND ACTED UPON, IF IT IS MADE CLEARLY TO APPEAR THAT THE NATURE AND EFFECT ARE UNDERSTOOD BY THE ACCUSED. IN SUCH A CASE THE PRELIMINARY INVESTIGATION OF A GRAND JURY, WITH THE ADMISSION OF THE ACCUSATION, THE INDICTMENT, IS SUPPOSED TO BE A SUFFICIENT SAFE-GUARD TO THE PUBLIC INTERESTS." (Capitals supplied.)

Thus, it can be seen WHY a plea of guilty to an INDICTMENT will be received and acted upon. IN SUCH A CASE THE

PRELIMINARY INVESTIGATION OF A GRAND JURY, WITH THE ADMISSION OF THE ACCUSATION, THE INDICTMENT, IS SUPPOSED TO BE A SUFFICIENT SAFE-GUARD TO THE PUBLIC INTERESTS. And it is for this same reason that Chapter 27-317 of the Compiled Statutes of Nebraska for 1929, the material part of which is quoted on pages 23 and 24 of your petitioner's original petition for writ of certiorari, requires that a judge of the District Court of Nebraska give a ten days' notice to both the accused and the prosecuting attorney before he may accept a plea of guilt and pass sentence thereon. This delay is considered necessary to safe-guard the interests of both the public and the defendant, and it was for this reason that the Legislature of the State of Nebraska enacted such a provision. This is the "strange interpretation of the statute" to which the respondent refers on page 28 of his brief. If it be strange, it is only because your petitioner has chosen to use the literal interpretation of the words contained in Chapter 27-317, *supra*, as they are defined in Webster's Unabridged Dictionary and as they are understood by common usage. Furthermore, your petitioner wishes to respectfully point out that Chapter 27-317, *supra*, specifically provides that only after giving such a ten days' notice does the district judge HAVE POWER TO accept a plea of guilty. Thus, the very jurisdiction of the court is dependent upon that ten days notice, and, after reading the quotation from the *Cancemi* case, *supra*, not even the respondent would dare to say that a defendant in a criminal action can waive the jurisdiction of the court.

In Point I of his brief, the respondent discusses each of the authorities relied upon by the petitioner, and, in almost every instance, after outlining the nature of the case involved in the citation, he stated that "The case has no bearing on the present action", or some similar statement with a like meaning. The basis for these statements, as implied by the respondent, is that none of the authorities

cited by your petitioner involve burglary or burglary with explosives. For example, after quoting a part of the syllabus from the case of *In re Nielsen,* 131 U. S. 176, the respondent stated that "The case involved double jeopardy, and has no bearing on the present action." Likewise, after quoting a portion of the syllabus in the case of *State* v. *Robertson,* 55 Neb. 41, 75 N. W. 37, the respondent stated that "In short, the case deals with the Statute of Limitations and has no bearing whatever on the present action." The objection, of course, "falls with the premise" (*Mooney* v. *Holohan,* 294 U. S. 103, 113), because if it did not, then this Honorable Court has, in the past, made and supported thousands of opinions with so-called "causual" (casual) remarks and excerpts from opinions that do not apply. For example, in the opinion rendered by this Court in the case of *Johnson* v. *Zerbst,* 304 U. S. 458, a case involving the possession and uttering of counterfeit money wherein the defendant was tried without counsel, this Court supported its opinion with quotations, among others, from the opinions rendered in the cases of (1) *Palko* v. *Connecticut,* 302 U. S. 319, a case involving murder and the alleged denial of due process of law; (2) *Hans Nielsen, Petitioner,* 131 U. S. 176, a case involving adultery, double jeopardy, and a denial of due process of law; (3) *Powell* v. *Alabama,* 287 U. S. 45, a case involving rape and the denial of due process of law; (4) *Mooney* v. *Holohan,* 294 U. S. 103, a case involving murder and the alleged denial of due process of law; and (5) *Woolsey* v. *Best,* 299 U. S. 1, a case involving the acceptance of deposits by an insolvent bank and the alleged denial of due process of law. Likewise, quotations from the opinions rendered in the cases of *Aetna Insurance* v. *Kennedy,* 301 U. S. 389, and *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, were cited by this Court in the *Johnson* opinion, *supra,* and it is a noteworthy fact that both of these cases were of a civil nature.

It is also a noteworthy fact that none of the seven aforementioned cases involved the possession and uttering of counterfeit money, yet this Court seemed to think that they all supported, in some manner or other, the opinion rendered in the case of *Johnson* v. *Zerbst, supra.* Your petitioner cited 39 different cases, each supporting, in its own way, a particular contention made in his petition for a writ of certiorari. If these cases are sufficient for reference and support in upholding various points in opinions rendered by this Honorable Court, then they are also sufficient, in their proper places, to uphold the contentions of your petitioner in the instant case.

In his effort to disprove your petitioner's contentions, the respondent completely overlooked a provision of Rule 38, Paragraph 2 of the Revised Rules of this Court, effective February 27, 1939, wherein it is stated that "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." True enough, this particular sentence mentions only the PETITION for writ of certiorari, but is it not reasonable to believe that this Court will likewise consider only those OBJECTIONS which pertain directly to questions specifically brought forward by the petition for writ of certiorari? Only once in the entire 41 pages of his brief does the respondent object to a question specifically brought forward by your petitioner in his petition for a writ of certiorari, and this single objection is made on pages 29 and 30 of the respondent's brief following a reconstructed version of what is supposed to be your petitioner's fifth contention. Actually, this is a reconstruction of your petitioner's FOURTH contention in his petition for a writ of certiorari, and the objection made thereto by the respondent upholds, rather than tears down, your petitioner's argument on that particular contention. It is the respondent, and not the petitioner, who has distorted the language of this Court.

In an effort to support one of his objections, counsel for the respondent mentioned, on page 19 of his brief, a so-called "epidemic of applications for the writ of certiorari addressed to this court during the past several weeks by inmates of the Nebraska Penitentiary." Your petitioner has no argument with the respondent concerning any so-called epidemic, and the remark made by his counsel is entirely out of place in the respondent's brief. However, if there be such a epidemic, petitioner "cannot resist the temptation to sugg[illegible]" that counsel for the respondent, the Attorney General of Nebraska, would do well to investigate the procedure followed by the district courts of Nebraska, and, after such an investigation, acknowledge the truth and eliminate the cause of the so-called epidemic.

And again, on page 26 of his brief, counsel for the respondent mentioned "the petitioner herein and his CONFRERES." Petitioner wishes to respectfully point out to this Honorable Court, and to counsel for the respondent, that there are some nine hundred other men in this institution who are petitioner's confreres in the sense that they were all convicted, in some manner or another, of felonies. In any other sense they are not your petitioner's confreres, nor is your petitioner interested in any case other than the one before this Court now.

Truly, it is the objections made by the respondent's counsel, and not the contentions made by the petitioner, that can only be described as frivolous.

Your petitioner reiterates and respectfully submits that:

1. He was deprived of the immutable right to know the nature and cause of the accusation for which he was to answer, which deprivation is not denied by the respondent;

2. He was deprived of the fundamental right to the assistance of counsel for his defense;

3. He was deprived of the fundamental right to trial by a court of competent jurisdiction;

4. He did not knowingly, expressly, nor intelligently waive either or any of the foregoing immutable and fundamental rights of which he was deprived;

5. Only Federal questions of substance were brought forward in the petition for writ of certiorari;

6. The decision of the Supreme Court of Nebraska upon the Federal questions raised in that court by your petitioner is probably in conflict with applicable decisions of this Court;

7. All of the authorities cited in his petition support his right to a writ of certiorari, and, subsequently, a writ of *habeas corpus*.

It is further respectfully submitted that this case is a proper case for review by certiorari in this Court and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT SMITH,
Petitioner.

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